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Supreme Court of the United States

OCTOBER TERM, 1945.

No. 746

LEWIS EDWIN LEICHTY, DECEASED, MRS. L. E. LEICHTY, CLAIMANT, RESPONDENT,

VS.

KANSAS CITY BRIDGE COMPANY, PETITIONER.

PETITION FOR WRIT OF CERTIORARI.

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KANSAS CITY BRIDGE COMPANY, PETITIONER.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Kansas City Bridge Company, respectfully prays that a writ of certiorari be issued to the Supreme Court of Missouri to review a judgment of that court entered October 1, 1945 (Motion for Rehearing denied November 5, 1945), affirming a judgment of the Circuit Court of St. Charles County, Missouri. A certified transcript of the record in this case, including the proceedings in the Supreme Court of Missouri, is furnished herewith in accordance with Rule 38 of this court.

STATEMENT OF THE MATTER INVOLVED.

The question involved is: Whether the Supreme Court of Missouri, in holding that Mrs. L. E. Leichty was the widow of Lewis Edwin Leichty and therefore entitled to recover for the death of Lewis Edwin Leichty the compensation provided by the Missouri Workmen's Compensation Law, denied full faith and credit under Article IV, Section 1, of the United States Constitution, to the decree of divorce obtained September 20, 1935, by Lewis Edwin Leichty against Mrs. L. E. Leichty in the District Court of Wyandotte County, Kansas.

Lewis Edwin Leichty was killed while in petitioner's employ July 24, 1937. Mrs. L. E. Leichty filed a claim for compensation before the Missouri Workmen's Compensation Commission for his death, claiming to be his widow and as such entitled to the compensation provided for in such cases (R. 3). The answer of the Kansas City Bridge Company was a general denial (R. 4). A hearing was held before a single Commissioner of the Missouri Workmen's Compensation Commission. At the hearing Mrs. L. E. Leichty testified she was the wife of Lewis Edwin Leichty. The Kansas City Bridge Company offered in evidence the duly verified decree and other proceedings in the District Court of Wyandotte County, Kansas (R. 28), authenticated under the Act of Congress, by which Mr. Leichty secured a default divorce from Mrs. Leichty September 20, 1935, on service by publication. The divorce proceedings introduced in evidence are in all respects regular on their face, and fail to disclose any fraud practiced by Mr. Leichty in obtaining the divorce.

At the hearing Mrs. Leichty introduced evidence (and your petitioner introduced evidence in opposition) tending to show that this divorce was procured by fraud.

The fraud claimed was that Leichty made a false affidavit that he did not know where Mrs. Leichty was, in order to avoid service of actual notice of the suit on Mrs. Leichty. The Commissioner refused to recognize the divorce decree, found the divorce was procured by fraud, and that the deceased left surviving a wife, Mrs. L. E. Leichty (R. 9), and accordingly issued his award in favor of claimant, Mrs. L. E. Leichty for $9,380.

On the Bridge Company's application for review to the full Commission (R. 9-10) the award was affirmed. On appeal duly taken by the Bridge Company to the Circuit Court of St. Charles County the award was again affirmed and judgment entered for Mrs. L. E. Leichty. On appeal duly taken by the Bridge Company to the Supreme Court of Missouri, that court *en banc* affirmed the judgment in favor of Mrs. L. E. Leichty October 1, 1945, on the ground that the divorce obtained by deceased was procured by fraud and that because of the fraud the divorce was void, and that the court in refusing to recognize the Kansas divorce had not denied full faith and credit under Article IV, Section 1, of the Constitution of the United States, to the Kansas divorce decree. A motion for rehearing was denied by the Supreme Court of Missouri November 5, 1945.

The fraud which the Supreme Court of Missouri found Lewis Edwin Leichty committed in obtaining the Kansas divorce was said by the Supreme Court of Missouri in its opinion, and in its opinion denying petitioner's motion for rehearing, to be as follows:

Opinion (R. 104-105):

> "Then the claimant, over appellant's objection, introduced evidence tending to show: that deceased obtained the order of publication in the divorce case by falsely swearing that he did not know her address;

that at the time he instituted the divorce suit, during its progress and later, he was in correspondence with her, addressing his letters to her at Oklahoma City where she was staying, some letters to that effect being received in evidence; that when he filed suit he wrote to a woman at a town in Texas that he had caused a copy of the petition to be mailed there as his wife's last known address, (as required by the Kansas statute) and asked the woman to tell 'them you don't know her address and it will be returned here' so his wife couldn't cause trouble in the divorce suit; that after the divorce decree deceased joined with claimant as husband and wife in executing and acknowledging a deed to real estate; that after the decree of divorce deceased visited claimant, lived with her as her husband for a short time and introduced her as his wife; that claimant did not learn of the divorce decree until after her husband's death."

Opinion denying Motion for Rehearing (R. 124):

"The instant case involves more than a false affidavit to procure an order of publication. In suits against non residents the Kansas statute not only requires publication, but also that a copy of the petition be mailed to the defendant at his or her last known address or an affidavit be filed stating why that cannot be done. That is as much a part of the service as the publication. In the instant case, as pointed out in our original opinion, there was evidence that the plaintiff in the divorce suit made a false affidavit to procure publication and also, despite the fact that he was in correspondence with his wife in Oklahoma, sent a copy of the petition to a friend in Texas with the request that she return it and state she did not know the wife's location, so she could not cause trouble in the suit. If true, that was an active obstruction of one of the 'due process' requirements of the statute."

It is petitioner's contention here that under the law of Kansas where the divorce was granted the fraud which it is said Lewis Edwin Leichty committed did not render void the decree of divorce (in all respects regular on its face), and that the Supreme Court of Missouri violated the provisions of Article IV, Section 1, of the United States Constitution, when that court refused to recognize and give effect to the Kansas divorce decree.

STATEMENT OF THE BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

(A) Statutory Provisions Believed to Sustain Jurisdiction.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code as Amended by the Act of February 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937 (28 U. S. C. A., Sec. 344(b)), and under the same Act, Ch. 229, Sec. 8, 43 Stat. 940 (28 U. S. C. A., Sec. 350).

(B) Article IV, Section 1, of the Constitution of the United States, Is Involved.

The provision of the Constitution of the United States under which petitioner claims rights denied it by the Missouri Supreme Court, is Article IV, Section 1, which provides as follows:

> "Section 1. Records and judicial proceedings of sister States.—Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

(C) Date of the Judgment Sought to Be Reviewed.

The judgment of the Supreme Court of Missouri affirming the judgment of the Circuit Court of St. Charles County, Missouri, was rendered October 1, 1945 (R. 103). Petitioner's motion for rehearing was denied by the Supreme Court of Missouri November 5, 1945 (R. 122-123). This petition for a writ of certiorari, and a certified transcript of the record were filed in this court within three months from November 5, 1945, the date upon which the judgment of the Supreme Court of Missouri became final.

(D) Grounds Believed to Sustain Jurisdiction.

The ground believed to sustain jurisdiction here is that the Missouri Supreme Court in ruling that the decree of divorce, regular on its face, rendered by the Kansas court was void, contrary to the ruling of the Kansas courts on the validity of such judgments, denied to the Kansas judgment the full faith and credit to which it is entitled under Section 1 of Article IV of the Constitution of the United States.

The deceased Leichty secured a decree of divorce, in all respects regular on its face, from his wife, in the State of Kansas, on service by publication, she then being a non-resident of the State. Leichty was killed about a year and a half later while in the defendant's employ. Mrs. Leichty, claiming to be his widow, applied to the Missouri Workmen's Compensation Commission for compensation. Your petitioner then offered an authenticated copy of the Kansas proceedings and decree. Mrs. Leichty then offered evidence in effect that Leichty had procured service by publication by making a false affidavit to the effect that he did not know her whereabouts when in fact they were well known to him. Under the Kansas

law, if Leichty had stated that he had known her whereabouts a copy of the petition for divorce would have been sent to her and she would, therefore, have known of the proceeding. She claimed that this false affidavit prevented her from learning of the pendency of the case, and, therefore, that the Kansas court was without jurisdiction to render a valid decree of divorce. The Missouri Supreme Court so held, contrary to the ruling of the Kansas Supreme Court in the following cases:

Larimer v. *Knoyle,* 43 Kan. 338.

McCormick v. *McCormick,* 82 Kan. 31, 107 Pac. 546.

Brumbaugh v. *Wilson,* 82 Kan. 53, 107 Pac. 792.

Martens v. *Green,* 113 Kan. 142, 213 Pac. 642.

Davis v. *Vinson Land Co.,* 76 Kan. 27, 90 Pac. 766.

Marler v. *Stewart Farm Mtg. Co.,* 111 Kan. 444, 207 Pac. 823.

Blair v. *Blair,* 96 Kan. 757.

These cases all hold in substance that where such a false affidavit is made in order to procure service by publication, the falsity of the affidavit does not deprive the court of jurisdiction and that the decree rendered pursuant to such publication is not void but is voidable only in a direct proceeding to set it aside. Hence, the Missouri Supreme Court did not give full faith and credit to the decisions of the Kansas Supreme Court, but on the contrary its ruling is squarely in conflict with them.

It makes no difference whether the affidavit is true, or false and fraudulent. The Kansas cases cited hold that the affidavit is not a part of the service; that the service is the publication of the notices in the newspaper; and that the publication of such notices is just as much notice to the defendant when the affidavit upon which

the service by publication is obtained is false as when it is truthful.

This court has uniformly recognized that service by publication in a divorce action if authorized by state statute is permissible and is "due process." The service by publication statutes of Kansas as construed by their own courts hold that service by publication is authorized when an affidavit such as Leichty's is filed. Consequently the court in the Leichty action did acquire jurisdiction and the divorce decree rendered in favor of Mr. Leichty in Kansas is entitled to full faith and credit in the courts of Missouri.

If Mr. Leichty committed fraud in obtaining service by publication in the Kansas divorce action Mrs. Leichty would have an action for damages for such fraud or she could have had the decree set aside in a direct proceeding instituted by her against Mr. Leichty in the courts of Kansas as authorized by the General Statutes of Kansas (1935), Sections 60-2530 and 60-3007. The Kansas City Bridge Company was not a party to the alleged fraud. The divorce proceedings and decree obtained by Mr. Leichty in Kansas were in every respect regular on their face.

The Bridge Company is an innocent third party. It had a right to rely on the record in the Kansas divorce action. The Bridge Company had no means of discovering the fraud, nor did it have any reason to suspect that fraud had been committed. Consequently as between Mrs. Leichty and the Bridge Company the divorce decree was rendered by a court having jurisdiction and that decree is entitled to, but was not given, full faith and credit in the courts of Missouri. If this were not the rule third persons such as the Bridge Company could not rely on the records of judicial proceedings regular on their face, but in all cases where service was by publication and the

defendant had not entered an appearance would have to conduct an independent investigation to determine whether fraud had been practiced in procuring the decree although that fact would not appear on the record. This would be an intolerable situation.

This court in *Meidreich* v. *Lauenstein*, 232 U. S. 236, 58 L. Ed. 584 (1914), announced the correct rule. That is, that a judicial proceeding regular on its face can be relied on by third persons. This rule is fundamental in our system of jurisprudence. Judicial proceedings are recorded and records kept in part for the very purpose of enabling third persons to act in reliance upon them.

The pertinent statutes upon which service by publication was had in the divorce action brought by Lewis Edwin Leichty in the State of Kansas are as follows:

> "Before service by publication can be made, an affidavit must be filed, stating the residence, if known, of the defendant or defendants sought to be served, and if not known, stating that the plaintiff has diligently inquired as to the residence of such defendant or defendants and has been unable to learn the place of such residence and that the plaintiff is unable to procure actual service of summons on such defendant or defendants within this state, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed the party may proceed to make service by publication. * * *" Gen Stat. of Kansas (1935), Section 60-2526.

> "The petition must be verified as true, by the affidavit of the plaintiff. A summons may issue hereon, and shall be served, or publication made, as in other cases. When service by publication is proper, a copy of the petition, with a copy of the publication notice attached thereto, shall within three days after the first publication is made be enclosed in an envelope addressed to the defendant at his or her place of residence, postage paid, and deposited

in the nearest post office, unless the plaintiff shall make and file an affidavit that such residence is unknown to the plaintiff, and cannot be ascertained by any means within the control of the plaintiff." Gen. Stat. of Kansas (1935), Section 60-1504.

Upon filing suit for divorce Lewis Edwin Leichty made an affidavit as required by the above statutes (R. 26) that the residence of defendant was unknown to him; that he has made diligent inquiry to learn the place of her residence; that he did not know and with diligence had been unable to ascertain whether defendant was living or dead. Upon making this affidavit service by publication was authorized under the Kansas statute. It was not necessary to mail a copy of the petition to the defendant, Mrs. L. E. Leichty, for the reason that Section 60-1504 of the Kansas Statutes referred to above does not require a copy of the petition to be mailed to the defendant when an affidavit such as Leichty made is filed. The Supreme Court of Missouri erroneously held (R. 105) that the Kansas Statute required a copy of the petition to be mailed to the defendant and that the mailing of such copy was as much a part of the service as the service by publication and the fraud which Leichty committed in sending a copy of the petition to a friend in Texas addressed to Mrs. L. E. Leichty with a request that his friend return it was an active obstruction of one of the "due process" and rendered the divorce decree void. This finding of the Supreme Court of Missouri was erroneous for the reason that Leichty having made an affidavit that he did not know his wife's address was not required to mail her a copy of the petition, and not being so required his actions in respect to the copy of the petition he did mail did not and could not constitute fraud.

The Supreme Court of Missouri also found that the affidavit which Leichty made to procure service by publication was false and fraudulent in that Leichty did know his wife's whereabouts, and that for this reason the divorce decree was void and not entitled to full faith and credit under Article IV, Section 1, of the United States Constitution. This finding of the Supreme Court of Missouri was likewise erroneous. The following decisions of the Supreme Court of Kansas construing their own statutes uniformly hold that their courts do acquire jurisdiction, even though an affidavit such as Leichty made is false and fraudulent:

Larimer v. *Knoyle*, 43 Kan. 338.
McCormick v. *McCormick*, 82 Kan. 31, 107 Pac. 546.
Brumbaugh v. *Wilson*, 82 Kan. 53, 107 Pac. 792.
Martens v. *Green*, 113 Kan. 142, 213 Pac. 642.
Davis v. *Vinson Land Co.*, 76 Kan. 27, 90 Pac. 766.
Marler v. *Stewart Farm Mtg. Co.*, 111 Kan. 444, 207 Pac. 823.
Blair v. *Blair*, 96 Kan. 757.

All of the above cases are in accord. Among them, in the case of *Larimer* v. *Knoyle*, 43 Kan, 338, one Knoyle procured a divorce in Kansas on the ground that his wife had wilfully abandoned him, and made an affidavit to secure service by publication, that Mrs. Knoyle was a non-resident of the State of Kansas. He also made an affidavit that her place of residence was unknown to him. In point of fact, Knoyle had sent Mrs. Knoyle out of the state to visit friends (so she subsequently claimed). After the divorce, Knoyle died, leaving a will which bequeathed his property to others. Mrs. Knoyle then brought an action in Kansas to set the will aside on the ground that she was his widow and sole surviving

heir. The sole question in the case was whether or not the decree of divorce was void for want of jurisdiction in the court rendering it, or for fraud on the part of Knoyle in procuring it. The court held, first, that service by publication conferred jurisdiction on the court to enter the divorce decree, although the affidavit on which such service was based was false and fraudulent; second, that therefore, the decree was merely voidable, not void, and third, that therefore, the decree was not subject to collateral attack. The court said, l. c. 347:

> "The affidavits for publication and in lieu of sending a copy of the petition and publication notice to the defendant, are no part of the service of the summons. They are simply foundations for such service where service is made by publication. Where they are sufficient on their face, service may be made by publication, and by publication alone. But being foundations for the service by publication, it is of course necessary that they should be filed, and if they are not filed a service of summons made by publication without them would be void (*Shields* v. *Miller*, 9 Kan. 390; *Harris* v. *Claflin*, 36 *id.* 543). But where they are valid and sufficient upon their face, and service by publication is made upon them or in pursuance of them, *no one can afterward impeach such service or question its validity in a collateral proceeding by showing that the affidavits were in fact untrue.* No one would think of impeaching an attachment of property, real or personal, in a collateral proceeding because he might think that the grounds set forth in the affidavit for the attachment were untrue and false. Such a thing could be done only in a direct proceeding instituted for that purpose, as upon a motion to quash, or to set aside, or to vacate, or to discharge the attachment or some part thereof" (Italics ours).

In *Blair* v. *Blair*, 96 Kan. 757, a husband secured a decree of divorce from his wife, based on service by

publication, in Johnson County, Kansas. He then remarried and died in Missouri. The second wife and one child survived him. The first wife then brought an action in Johnson County, Kansas, against the second wife and child to set aside the decree of divorce, securing service on the defendants in Missouri. Her petition alleged that her husband's affidavit on the basis of which service by publication was made, to the effect that he did not know his wife's place of residence and had no means of ascertaining it, was false and fraudulent, and that by reason thereof she received no notice whatever of the proceeding. Hence, the attack on the divorce decree was on the identical ground presented here. The court, by Judge Burch, held that the Kansas court had no jurisdiction; that if the action be treated as a direct attack on the Kansas divorce, it came too late under the statute, and that if it was a suit in equity to set the divorce aside, the court had no jurisdiction over the defendants. The court said, l. c. 758-9:

> "It is well settled by previous decisions of this court that the decree of divorce was not void. All the formalities which the law required to be observed were observed. A verified petition showing that the plaintiff was a resident in good faith of Johnson County, had been such for more than a year, and stating a statutory ground for divorce, was filed. A proper showing for service by publication was made and a proper notice was published. A proper affidavit giving reasons for not mailing the petition and publication notice was filed. The prescribed preliminary steps having been taken, the court acquired jurisdiction. All that followed was the exercise of jurisdiction, and the journal entry of judgment discloses that the subsequent proceedings were regular in every particular. *It made no difference if the affidavit giving the reason for not mailing a copy of the petition and of the notice were false* (*Larimer* v. *Knoyle*, 43 Kan. 338, 23 Pac. 487). Blair was required to allege

and prove residence such as the law required. It made no difference if the allegation were false (*Larimer* v. *Knoyle, supra*). Jurisdiction over the subject of divorce, a petition good on its face, and due service by publication gave the court the right to take the evidence and decide the question of residence. If the decision were wrong, it was not void for want of jurisdiction (*Miller* v. *Miller,* 89 Kan. 151, 130 Pac. 681). It made no difference if all the other allegations of the petition were false and were sustained by false testimony. The judgment would still not be void (*McCormick* v. *McCormick,* 82 Kan. 31, 107 Pac. 546; *Miller* v. *Miller, supra*)" (Italics ours).

Thus this case squarely holds that a false affidavit, such as is charged here, does not render the decree void and does not deprive the court of jurisdiction.

Therefore, as established by *Larimer* v. *Knoyle* and *Blair* v. *Blair,* and other cases referred to in our brief, the Kansas court did have jurisdiction in the divorce action brought by Leichty and its decree is entitled to full faith and credit under Section 1, Article IV, of the United States Constitution and Missouri courts have failed to give to the Leichty divorce decree that full faith and credit to which it is entitled.

If the rule as announced by the above Kansas cases were not the law third parties could not rely upon the records and judgments regular on their face, as was the record and judgment in the Leichty divorce action, but would act at their peril. This defendant is such a third person and had the right to assume, in continuing Lewis Edwin Leichty in its employ, that in event of his death while so employed there would be no widow who could claim compensation under the Missouri Workmen's Compensation Act for his death. This doctrine was firmly established by this court in *Miedreich* v. *Lauenstein,* 232 U. S. 236, 58 L. Ed. 584 (1914), where this court held that

due process was not denied where the courts of Indiana refused to set aside a judgment in a mortgage foreclosure action shown to have been based on a false sheriff's return, where the injured party had a remedy by action of the sheriff's bond. This court there held that this result necessarily followed in order to protect third persons. In the Miedreich case the third person was the one who bought the property at the foreclosure sale. In that case this court held that the purchaser at the foreclosure sale had a right to rely on the validity of the sheriff's return. No showing was made in that case that he had in fact relied on such return. In the present case if Leichty committed fraud Mrs. L. E. Leichty would have had an action for damages against him for fraud or she could have had the judgment set aside in a direct proceeding against Leichty as authorized by the General Statutes of Kansas (1935), Sections 60-2530 and 60-3007. Whether these remedies are adequate is a question this court will not consider. Due process exists if the state provides a remedy. In *Miedreich* v. *Lauenstein* this court held that due process of law did not depend upon whether the action provided for on the sheriff's bond was adequate, but that due process existed since Indiana had provided a remedy available to the injured party.

This court in *Miedreich* v. *Lauenstein* did find that while the sheriff's return was false no fraud had been committed by the plaintiff in the foreclosure proceedings. We submit that the result would have been the same, even though fraud had been committed in that case for the reason the third party who purchased at the foreclosure sale could not have discovered the fraud from an examination of the record and consequently would have the right to rely on the record in the foreclosure action, whether it was false as well as fraudulent. Likewise in the present case the Bridge Company in continuing Lewis

Edwin Leichty in its employ had a right to rely on the records in the divorce action which were regular on their face and assume that Leichty had no wife who could claim compensation under the Missouri Workmen's Compensation Act in the event of his death. Like the purchaser at the foreclosure sale in the Miedreich case the Kansas City Bridge Company could not discover the fraud in the Kansas divorce action. The right to rely on the records of judicial proceedings given third parties would be an empty one if it were given only when the record was false and not when it was both false and fraudulent.

The question raised is substantial for the decision of the Supreme Court of Missouri is contra to the decisions of the Supreme Court of Kansas construing their own statutes and is contra to the doctrine announced by this court in *Miedreich* v. *Lauenstein*. Further, we believe that while the doctrine of the Miedreich case is an old and well established doctrine as applied to the facts of the present case presents a question of first impression.

Petitioner has throughout the proceedings in the courts of Missouri maintained that the divorce decree obtained by Lewis Edwin Leichty in Kansas was valid and was entitled to full faith and credit under Article IV, Section 1, of the Constitution of the United States. At the hearing before one commissioner of the Missouri Workmen's Compensation Commission petitioner objected to the introduction of evidence offered on behalf of Mrs. L. E. Leichty to show that the Kansas divorce was procured by fraud (R. 32). In its application for review to the full Workmen's Compensation Commission petitioner contended (R. 10) that the award of the single Commissioner was contrary to and in violation of Article IV, Section 1, of the Constitution of the United States. On appeal to the Supreme Court of Missouri from the

judgment of the Circuit Court of St. Charles County, Missouri, affirming the award of the Missouri Workmen's Compensation Commission petitioner contended that the Leichty divorce decree was entitled to full faith and credit and could not be impeached for fraud, and the court denied petitioner's contentions and held (R. 105) that the divorce decree was void. Again in its motion for rehearing (R. 111) and in its suggestions in support of its motion for a rehearing (R. 112) petitioner made the same contention, but the Supreme Court of Missouri in denying petitioner's motion for a rehearing in its opinion (R. 123-124) refused to recognize and give full faith and credit to the divorce decree obtained by Leichty in the State of Kansas.

Your petitioner believes that it has adequately set forth in this petition for a writ of certiorari the reasons why a writ of certiorari should issue in this case and accordingly petitioner will not file a brief in support thereof.

Wherefore your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Missouri commanding said Court to certify and send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and of all the proceedings of the said Supreme Court of Missouri in the case entitled, "Lewis Edwin Leichty, deceased, Mrs. L. E. Leichty, claimant, Respondent, vs. Kansas City Bridge Company, Appellant, No. 39379," and that the judgment herein of the Supreme

Court of Missouri be reversed by this Court and that your petitioner have such other and further relief in the premises as this Honorable Court may deem appropriate and proper.

Kansas City Bridge Company,
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